Supreme Court, U.S.
FILED
FEB 15 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARK A. HUMPHREY AND FREDD J. HAAS
d/b/a HUMPHREY & HAAS,

Appellants,

VS

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee

On Appeal from a Judgment of the Iowa Supreme Court

MEMORANDUM OF APPELLEE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION

NICK CRITELLI*
CRITELLI AND SHERBURNE
500 U.C.B. Bldg.
Des Moines, Iowa 50309

**Counsel of Record*

FRANK A. COMITO
COMITO AND CAPPS
4701 University Ave.
Des Moines, Iowa 50311

Counsel for Appellee

February 15, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the state may regulate the use of certain techniques employed in lawyer electronic media advertising which are designed to appeal to the emotions, prejudice, likes or dislikes of the viewing public and which inhibit the exercise of an intelligent or rational decision making process in determining the need for and choice of an attorney.

2. Whether the state may require those who wish to extend the boundaries of lawyer advertising beyond that set by established discliplinary rules to submit to review through an administrative procedure so as to insure compliance with the state's interest in intelligent, rational decision making in determining the need for and choice of an attorney.

3. Whether the lawyer television advertisements in this case, through their design and marketing, violated the state's interest in rational, intelligent decision making in the determination of the need for and choice of an attorney.

4. Whether the lawyer television advertisements in this case misled or had the potential to mislead the viewing public regarding fees charged and expertise of the advertising law firm.

5. Whether legal services involving the handling of wrongful death, serious personal injury or workman's compensation cases are "routine legal services" within the meaning of *Bates vs. State Bar of Arizona* 433 U.S. 350 (1977).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
REQUEST FOR PLENERY CONSIDERATION	1
STATEMENT IN SUPPORT OF PLENERY CONSIDERATION	1
A. Electronic Media Advertising	1
B. "Safe Harbor" Administrative Procedure	5
MOTION TO AFFIRM	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES: Page

Bates vs. State Bar of Arizona, 433 U.S. 350 (1977) *passim*

Central Hudson Gas and Electric Corporation vs. Public Service Commission of New York, 447 U.S. 557 (1980) ..... *passim*

Rapp and Gillium vs Committee on Professional Ethics and Conduct of the Iowa State Bar Association, et al. 540 F. Supp. 1092 (D.C Iowa 1980) 3

In Re R.M.J., 455 U.S. 191 (1982) 3

Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc. 425 U.S. 748 (1976) 10

STATUTORY PROVISIONS:

Iowa D.R. 2-101 ..... *passim*

Iowa, Ethics Rule 5.1 6

I
REQUEST FOR PLENERY CONSIDERATION

Appellee Hereby Requests the court to Grant Jurisdiction and Give Plenery Consideration to This Appeal

STATEMENT IN SUPPORT OF PLENERY CONSIDERATION

This case presents two questions of first impression the resolution of which are of vital importance to the Bench, Bar, litigants and the consuming public. Initially the appeal concerns the power of the State to regulate certain techniques employed in lawyer electronic media advertising. Secondly it concerns an administrative procedure designed to implement lawyer advertising utilizing what has been described as a "safe harbor" approach to lawyer advertising.

A. Electronic Media Advertising

Rule DR 2-101 (A) and (B) does not prohibit the use of the electronic broadcast media. It seeks to regulate certain methods or tools of persuasion employed in commercial radio and television advertisements. Dramatizations and emotional appeals targeting the prejudice, likes or dislikes of the viewing public are regulated[1] as being contrary to the articulated state interest that the public exercise an intelligent or rational decision making process in determining the choice of an attorney.[2] Both the state interest sought to be protected and the effect of dramatization and emotional appeal are supported in the factual testimony underlying the Iowa Rule.[3]

---

[1]DR 2-101 (A) and (B) App. D. 28a-30a.

[2]Trans. 95. Testimony of former Justice Robert Allbee. See also *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) for judicial recognition of the validity of the state interest.

[3]Trial Ex. 16A.

In pertinent part, concerning lawyer electronic media advertising, Iowa Rule DR 2-101 (A)[4] states:

> "A lawyer shall not, on the lawyer's own behalf or that of a partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory or unfair statements, which contains any statements or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, or likes or dislikes of a person or which contains any claim that is not verifiable; . . ."

In addition to the prohibition against appeals to the emotion, DR 2-101 (B)[5] makes the following regulation regarding use of the electronic broadcast media:

> ". . . The same information, in words and numbers only, articulated only by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio. The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer."

As identified in *Bates vs. State Bar of Arizona*, 433 U.S. 350, (1977) the "special problems of advertising on the electronic broadcast media will warrant special consideration." To date, on subsequent case has given condsideration to

---

[4]DR 2-101 (A) App. D. 28a.

[5]DR 2-101 (B) App. D. 29a.

what, if any, limitations may be placed on electronic broadcast advertising by lawyers.

Since Bates, and its progeny, in Re R.M.J. 455 U.S. 191 (1982), most States have promulgated some form of regulation regarding lawyer electronic media advertising. The scope of the regulation, however, varies widely from state to state.[6]

In R.M.J., supra at 455 U.S. 205, this Court cited to Missouri's failure to support its regulation with an adequate record[7]. In response to the decision in Bates, supra, the Iowa Supreme Court conducted hearings and reviewed expert testimony which resulted in the promulgation of Iowa's DR 2-101 (A) and (B).[8] Unlike the record in R.M.J., supra., the regulation under consideration rests upon a foundation supported by fact and expert testimony.

In the case at bar, testimony was procured regarding the design intent of the Appellant's commercials . . . immediate

---

[6]Appellants Jur. Stmt. pg. 9 fn. 14

[7]455 U.S. 206.

[8]Pursuant to direction of the Iowa Supreme Court, the Committee on Professional Ethics and Conduct of the Iowa State Bar Association is a Commission of the court. On December 13, 1979, a hearing was held and expert testimony was taken regarding the state interest sought to be protected by lawyer advertising and what, if any, restrictions should be placed upon unrestrained lawyer advertising so as to further the articulated state interest. The Iowa Supreme Court, en banc, at a public hearing, received the Committee's recommendation, the testimony introduced before the Committee and additional briefs and arguments from the public. After due deliberation, the Iowa Supreme Court promulgated Iowa's DR 2-101 (A) and (B). For a detailed factual recitation regarding the procedure and background of the Rule, see *Rapp and Gillium vs. Committee*, 504 F. Supp. 1092 (D.C. Iowa 1980).

response-reaction,[9] as well as their "targeted" audience . . . injured accident victims[10].

The Iowa Supreme Court, in upholding the Rule, concluded that all that was prohibited by the Rule was the use of methods, techniques and tools "which would manipulate the viewer's mind and will"[11]. Dramatization is the essential element for the use of these "tools"[12].

---

[9]Dr. Richard Haynes. a Ph.D in mass communication and telecommunication research testified that the Appellant's commercials were designed around the concept of response-reaction or "per inquiry" like those used for selling records and the like, (Trans. p. 133) with the design intent to create an immediate reaction on behalf of the viewer to act and place a call. (Trans. 147.) Atty. James Gritzner of Appellant's law firm and with some measure of experience in the television broadcast industry (Trans. 37) testified that the design intent of their commercials was ". . . to prompt the viewer to make a phone call immediately." (Trans. 48) and that the reaction was facilitated by positioning and repetition: ". . . When that was flashed on the screen with the phone number, and the phone number repeated twice, that was designed, I believe, to promote those individuals to write it down or even better grab the phone and make a call." (Trans. 49)

[10]The specific target audience for the Appellant's commercials was pre-selected by their design to be injured accident victims' who may be watching television while in the hospital or home recouperating from an injury. (Trans. 458). The target audience concept was verified by the testimony of Mr. James Gritzner of Appellant's firm. (Trans. 57-58)

[11]Opinion, App. A. 31a.

[12]Trial Ex. 16a, pp. 64-70, expert witness testimony of Leonard J. Howe, executive director of Iowa Broadcasting Network. Mr. Howe testified that while there are dangers in any advertising, there are more dangers in the area of professional advertising. (Ex. 16a pp. 62). Regarding television, Mr. Howe testified that while the element of imagination is removed (as compared to radio) motion and all of the elements of drama are added ". . . so it is the ultimate in the dramatic or emotional form of the media" (Ex. 16a. pp. 67-68.) Mr. Howe further testified that while all three forms of communication—print, radio and television—can be abused, television, because it has more elements of drama, is the most abused. (Ex. 16a. p. 70).

This case presents the Court with the first opportunity to define the "special problems of advertising on the electronic broadcast media. . . ."[13] that were left unanswered by Bates, supra.

B. "Safe Harbor" Administrative Procedure

Rule DR 2-101 (B), (C) and (D)[14] establishes a listing of information that may be contained in lawyer advertisements. The Rule establishes a "safe harbor" regarding method and content for any lawyer about to voyage into the troubled sea of lawyer advertising.[15] Realizing, however, that no "safe harbor" list can be all inclusive, the Rule establishes an administrative procedure whereby advertisements, in form or content beyond that listed in the safe harbor itemization, may be authorized. Rule DR 2-101 (D)[16] establishes a procedure whereby any lawyer may extend the boundaries of the safe harbor. The Rule provides in part that:

---

[13]Bates, supra at 433 U.S. 384.

[14]App. D 32a-33a.

[15]e.g. Rule DR 2-101 (B) 1-19 (App. D 29a-30a) permits the dissemination of information concerning fields of practice, place and date of birth, date and place of admission to the bar of the state and federal courts; schools attended, dates of graduation, degrees and other scholastic distinctions; public and quasi-public offices held; military service; legal authorships; legal teaching positions held; memberships, officer and committee assignment in bar associations; whether credit cards or credit arrangements are accepted; race, sex, religion or ethnic background. In general, it is a curriculum vitea approach to information relevant to the intelligent selection of a lawyer. Likewise DR 2-101 (C) 1-4 (App. D 30a-31a) permits the inclusion of information relative to the fees charged for "specific legal services" defined in DR 2-101 (D) (App. D 31a-32a) as abstract examinations, uncontested dissolutions, wills, income tax preparation, changes of name, leases, mortgages, bills of sale, and all other matters authorized in Bates supra. at 433 U.S. 372.

[16]App. D. 32a.

> ". . . the committee shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said committee may futher issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule."[17]

Consistent with the intent of the Rule, the Committee established Rule 5.1 of the Committee on Professional Ethics and Conduct[18] to facilitate the administrative process set forth in DR 2-101 (D).

Unless there are to be no boundaries on the method or content used in commercial advertisements by lawyers, some procedure administered by some tribunal must be established to implement rules on advertising. Rule 2-101(D) as implemented by Committee Rule 5.1 seeks to

---

[17]DR 2-101 (D) App. D. 33a.

[18]Rule 5.1 Committee on Professional Ethics and Conduct states: "Any member of the bar desiring to expand the information authorized for disclosure pursuant to the provisions of DR 2-101 or DR 2-105, Iowa Code of Professional Responsibility for Lawyers, or to provide for its dissemination through forums other than therein authorized or otherwise to change those rules, may apply to the committee. Such application shall be made in writing by restricted certified mail, and shall include such documentation as the applicant deems appropriate. The committee thereafter shall determine, on the basis of documentation at hand, further investigation, or whatever hearings it deems to be necessary, whether all or any part of the proposal is necessary in the light of existing provisions of the code, accords with the standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services." The rule was approved by the Iowa Supreme Court by Court Order of May 18, 1978.

establish such an administrative procedure. In its opinion enjoining the Appellant's television commercials, the Iowa Court noted that Appellant's failed to follow the administrative procedure set forth in the Rule.[19]

This case presents to the Court its first opportunity to review an administrative procedure established to facilitate the growth of lawyer advertising.

WHEREFORE due to the importance of the issues to the litigants, the Bench, Bar and the consuming public Appellee joins Appellant and requests that the Court grant jurisdiction, give plenery consideration to the case and set the case for briefing and argument.

. . .IN THE ALTERNATIVE

II

MOTION TO AFFIRM

In view of Appellant's request for summary reversal and should the Court not grant jurisdiction and plenery consideration of this case, Appellee moves the Court to affirm the judgment of the Iowa Supreme Court.

STATEMENT IN SUPPORT OF ALTERNATIVE MOTION TO AFFIRM

As indicated in the Statement in Support of Plenery Consideration, the Iowa Supreme Court reacted to this Court's holding in Bates, supra. Hearings were conducted, expert testimony reviewed and oral arguments heard regarding the state interest sought to be fostered by lawyer advertising, the danger to the public regarding unrestrained lawyer advertising, and what restrictions, if any, should be placed upon lawyer advertising so as to minimize

---

[19]Opinion, App. 8a-9a.

the potential dangers while fostering the state interest sought to be protected.[20]

DR 2-101 (A) and (B)[21] represent a valid time, place and manner restriction regarding the use of the electronic broadcast media. The four-part test of *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) has been satified.

Pursuant to Central Hudson, supra at 477 U.S. 566, initially Appellant's commercials may be granted protection if they concern a lawful activity and are not misleading.[22] However while the commercials concern a lawful activity the Iowa Supreme Court, after trial, found them to be misleading regarding the fees and expenses to be charged the client as well as the extent of the expertise claimed by the law firm.[23]

Likewise, under the second part of the Central Hudson four-part test, the governmental or state interest sought to be protected by time, place and manner regulation must be substantial.[24] The state interest sought to be protected by DR 2-101 (A) and (B), has been identified by the Iowa Supreme Court as rational, intelligent and voluntary decision making in determining the need for legal services and the selection of a lawyer.[25] This state interest was articulated

---

[20]Trial Ex. 16a, Testimony before Committee; Testimony of Justice Robert Allbee, (Trans 87.)

[21]App. D. 28a-35a.

[22]Central Hudson, supra at 447 U.S. 566.

[23]Opinion, App. A. 10a-11a.

[24]Central Hudson, supra at 477 U.S. 566.

[25]Opinion, App. A. 13a.

by former Justice Allbee in his testimony during the trial of this case, and formulated the basis for the Rule itself.[26]

Whether the regulation directly advances the governmental interest, concerns the third part of the Central Hudson algorithm.[27] The effects of dramatizations resulting in the manipulation of the viewer's mind and will were the subject of expert testimony during the promulgation of the rule[28] as well as expert testimony produced during the trial of the case itself. Many witnesses testified regarding the design intent of these commercials as well as the audience that they targeted.[29] Commercials designed to manipulate the public to "grab the phone and make a call"[30] do not foster a rational, intelligent, and voluntary decision making process in determining the need for legal services, they simply manipulate the viewer.[31]

The last part of the Central Hudson test concerns the extent of the regulation and whether it extends beyond that which is necessary to serve the articulated state interest.[32] As the Iowa Court found, all that is prohibited are the tools, techniques or methods used to manipulate the viewer. Through the administrative process established by the

---

[26]Testimony of former Justice Albee, (Trans. 87); Ex. 3.

[27]Central Hudson, supra at 466 U.S. 566.

[28]Trial Ex. 16a.

[29]Mr. James Gritzner of Appellant's law firm, a lawyer with expertise in television broadcasting, admitted that the design of the commercials was to ". . . prompt the viewer to make a phone call immediately." (Trans. 48) Likewise, the knee-jerk reaction design of the commercials was the subject of testimony by Dr. Richard Haynes (Trans, 147).

[30]Testimony of James Gritzner. (Trans. 49)

[31]Opinion, App. A. 13a.

[32]Central Hudson, supra at 477 U.S. 566.

Rule, new information other than that listed in the "safe harbor" itemization may be communicated and the bounds of lawyer advertising broadened. Commercial speech concerns the consumer's right to receive information and ideas regarding potential commercial transactions as compared to the lawyer's "right" to transmit the speech.[33] DR 2-101 (A) and (B) allow all information necessary to educate the consumer and assist in the rational, intelligent decision-making process. The rule attempts to protect the public from manipulation by taking away the tools necessary for its operation . . . drama and emotion. Without these potent tools, the manipulation of the mind, the implantation and preceived need, the immediate response-reaction and all of the other techniques and methods that are used to control the public's mind are powerless.

WHEREFORE Appellee moves the Court to affirm the judgment of the Iowa Supreme Court.

---

[33]*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976).

CONCLUSION

Probable jurisdiction should be noted and plenery consideration given to the case. In the alternative, the Court should AFfirm the judgment of the Iowa Supreme Court.

Respectfully submitted,

NICK CRITELLI*
CRITELLI AND SHERBURNE
500 U.C.B. Bldg.
Des Moines, Iowa 50309

FRANK A. COMITO
COMITO AND CAPPS
4701 University Avenue
Des Moines, Iowa 50311

Counsel for Appellee.
**Counsel of Record*

February 15, 1985